STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY LEE PORTER,

Defendant-Appellant.

UNPUBLISHED
November 27, 2001

No. 223722
Oakland Circuit Court
LC No. 99-164920-FC

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of assault with intent to commit murder, in violation of MCL 750.83, and one count of intentional discharge of a firearm from a motor vehicle, in violation of MCL 750.234a. Defendant was sentenced as a third habitual offender, MCL 769.11, to 20 to 40 years' imprisonment on the assault convictions and 2 to 4 years' imprisonment on the firearm conviction. We affirm.

Defendant's convictions stem from an incident outside a school in which defendant was seen in a pick-up truck, with a male companion, before numerous gunshots were fired from the truck into a car occupied by five individuals, two of whom had a verbal altercation with defendant shortly before the shooting. Three of the car's occupants were struck by gunfire.

Defendant first argues that the jury instruction regarding mistake, the "transferred intent doctrine," should not have been given with respect to three of the victims because *People v Lawton*, 196 Mich App 341; 492 NW2d 810 (1992), is not controlling law. We disagree.

In reviewing a trial court's jury instructions, this Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

Defendant argues that *People v Ochotski*, 115 Mich 601; 73 NW 889 (1898), is controlling because it has never been overruled or modified. Defendant argues that the holding in *Ochotski* prohibits the use of transferred intent where there is but one act and multiple victims, such as in the present case. However, defendant misstates the holding. In *Ochotski*, the defendant struck several blows at two different people during the same affray. *Id.* at 609. He had been acquitted of assault against one of the victims and argued that therefore, he could not be

tried for assault upon the other. *Id*. Our Supreme Court held that the defendant could be tried for the assault on the second person because although the blows occurred during the same transaction, there were separate blows struck on each of the two individuals. *Id*. at 610.

In an attempt to illustrate the difference between one transaction and one volition, the *Ochotski* Court, in dicta, cited 1 Bishop, New Criminal Law, § 1061, and stated,

> [I]n one transaction a man may commit distinct offenses of assault or homicide upon different persons, and be separately punished for each. … [W]hat is meant by one volition is illustrated … as follows:
>
> "If one, by a single volition, should discharge into a congregation of people a firearm loaded with peas for shot, and each of 50 different persons should be hit by a pea, it would be startling to affirm that he could be punished for assault and battery 50 times." [*Id.*][1]

In the present case, there was not a single volition, but multiple volitions constituting a transaction, where seven or more bullets were sprayed into the car carrying the victims. This Court's ruling in *Lawton, supra,* controls our holding. The present case is factually similar to *Lawton,* where multiple gunshots were discharged into a house striking two persons who were not the intended victim, a third individual, and this Court upheld the conviction on three counts of assault with intent to commit murder on a transferred intent theory. *Id.* at 344-345, 350-351. The *Lawton* panel stated that before a defendant can be convicted based on a transferred intent theory,

> [I]t must first be shown that he had the intention to cause great bodily harm to someone. Merely because he shot the wrong person makes his crime no less heinous. It is only necessary that the state of mind exist, not that it be directed at a particular person. [*Id.* at 350-351 (citing *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979)).]

Requisite intent for assault to commit murder may be proved by inference from any facts in evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id*. In the present case, the evidence presented indicated that defendant had an earlier verbal altercation with two of the victims, and threatened to come back and shoot them. The evidence also indicated that at least seven bullets were recovered from the crime scene, witnesses recalled hearing between seven and ten gunshots, nine bullet holes were found throughout the length of

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[1] This Court in *People v Cronk,* 9 Mich App 606, 612 n 5; 157 NW2d 802 (1968), incorrectly cited *Ochotski* as support that Michigan is not an "as many crimes as victims" state. The above quoted language in *Ochotski* was only used as an illustration of the difference between a transaction and a volition. To whatever extent one could infer that the *Ochotski* Court agreed with the result of the volition example, this was dicta and therefore not binding. *People v Borchard-Ruhland,* 460 Mich 278, 286 n 4; 597 NW2d 1 (1999).

the car, three occupants of the car were struck by bullets, and gunfire came from the passenger side of a truck that defendant was driving.

These facts prove defendant intended to kill someone in the car. As instructed by *Lawton*, who in particular defendant was aiming at is irrelevant when using the doctrine of transferred intent. Defendant's intent to kill, as conferred upon him through an aiding and abetting theory [the jury was instructed as to the elements of assault with intent to commit murder and aiding and abetting], with regards to even one of the victims could be transferred to the others. Therefore, a jury instruction on transferred intent regarding all counts was appropriate.

Even had the instruction on transferred intent not been given, there was substantial evidence that supported a finding that there was an intent to kill each and every occupant of the car. Defendant's underlying premise, that there was no evidence of intent to murder those who were not involved in the earlier altercation, is faulty. Although the earlier altercation may have motivated defendant to harm those specific individuals, the violent assault indicated an intent to kill all inside, regardless of their identity, based on the number of shots fired, the injuries suffered, and the location of the bullets striking the car.

Next, defendant argues that the trial court erred in denying his motion for a jury view of the crime scene. Defendant contends that his motion was not untimely, as it was brought as soon as deemed necessary, plaintiff would not have been prejudiced as it could have reopened its proofs after the view if necessary, and the lot was only a short distance from the courthouse. Defendant asserts that a view of the lot would have aided the jury in determining witness credibility.

A trial court has the authority to conduct a jury view. MCL 768.28; MCR 6.414(D). Whether to grant a motion for a jury view is entrusted to the trial court's discretion, which requires this Court to review the issue for an abuse of that discretion. *People v Herndon*, 246 Mich App 371, 418; 633 NW2d 376 (2001). Granting a motion for a jury view is proper when it is believed that a personal view of the scene would enable the jurors to comprehend more clearly the evidence already received. *People v Connor*, 295 Mich 1, 6; 294 NW 74 (1940); *People v Curry*, 49 Mich App 64, 67; 211 NW2d 254 (1973). Where the judge gave cogent reasons for denying the request, an abuse of discretion cannot be said to have occurred. *People v Crown*, 75 Mich App 206, 212; 254 NW2d 843 (1977), rev'd on other grounds 417 Mich 908 (1983).

The trial court questioned defendant as to his contentions regarding the conflicts in the witnesses' testimony. Defendant responded that the view in the parking lot was not as clear as the witnesses related; when one actually saw the scene it looked quite different. Subsequently, the trial court personally viewed the lot and stated that it did not believe a jury view "would illuminate the understanding of the jurors" as to the testimony given.

The court also denied the motion because it was brought at the end of plaintiff's proofs. The court also expressed concern over verifying any changed conditions of the lot and pointed out that defendant had an opportunity to cross-examine plaintiff's witnesses. Because the trial court gave "cogent reasons" for its denial, we conclude there was no abuse of discretion.

Lastly, defendant argues that twenty-five points should not have been scored regarding offense variable 1 ("OV 1") because the trial court did not interpret the scoring instructions properly. The Supreme Court's sentencing guidelines apply to offenses committed before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). The offense defendant was convicted of occurred on October 22, 1998.

Under the Supreme Court's sentencing guidelines, relief is unavailable for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables. *People v Raby*, 456 Mich 487, 496-498; 572 NW2d 644 (1998). Because defendant's argument in the present case is based on a claim that the trial court misinterpreted OV 1, appellate relief is unavailable. Moreover, the judicial sentencing guidelines do not apply to habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997).

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ William B. Murphy